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Supreme Court of the United States

OCTOBER TERM, 1945.

No. [redacted] 4

PAN AMERICAN AIRWAYS CORPORATION and PAN AMERICAN AIRWAYS, INC.,

Petitioners,

against

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

HENRY J. FRIENDLY,
Attorney for Petitioners.

JAMES P. KRANZ, JR.,
Of Counsel.

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INDEX.

PETITION

	PAGE
INTRODUCTION	1
JURISDICTION	2
STATEMENT OF THE MATTER INVOLVED	2
THE QUESTIONS PRESENTED	9
REASONS RELIED ON FOR ALLOWANCE OF THE WRIT	12

BRIEF IN SUPPORT OF PETITION

THE OPINIONS BELOW	21
STATUTES	21
SPECIFICATION OF ERRORS	21
ARGUMENT	22

POINT I—The Circuit Court of Appeals held that the Civil Aeronautics Board had jurisdiction in a compulsory extension proceeding to inquire whether the failure of the carrier to apply for the extension was due to "illegality" or "fraud" on the part of one stockholder and, in the event of an affirmative finding, to consider the proceeding as if begun by a voluntary application derivatively filed by another stockholder. In so doing, the Circuit Court of Appeals decided an important question of Federal law erroneously and in conflict with the decision of this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, 281 U. S. 479 (1930) 22

POINT II—The Circuit Court of Appeals reversed the Board's determination that all questions as to its powers to deal with the charges and countercharges of Pan American and Grace should be considered in a separate proceeding and not in

PAGE

the compulsory extension case. By so doing, it wrongly intruded on the discretion of a Federal administrative agency as to the order in which issues should be considered before it, in disregard of the admonitions of this Court..... 31

POINT III—The Circuit Court of Appeals reversed the Board's order because of the Board's failure to consider questions never urged before it and which the party seeking review had not sought to have it consider. By so doing, the court departed from the accepted and usual course of judicial proceedings, violated the express limitations of Section 1006(e) of the Civil Aeronautics Act and disregarded applicable decisions of this Court and of other Circuit Courts of Appeals 37

POINT IV—The Circuit Court of Appeals set aside the orders of the Board on a ground not raised in the petition for review and not referred to in brief or argument before the court by any party. In so doing the court so departed from the accepted and usual course of judicial proceedings as to call for review by this Court..... 39

POINT V—The Circuit Court of Appeals necessarily held that, under the circumstances here presented, a stockholder has the "substantial interest" required to obtain review under Section 1006(a) of the Civil Aeronautics Act. In so doing, the court decided an important question of Federal law and decided that question erroneously and in conflict with applicable decisions of this Court 41

CONCLUSION 46

APPENDIX I:

Statutory Provisions I

APPENDIX II IX

BLEED THROUGH- POOR COPY

Table of Authorities

Cases

PAGE

Alexander Sprunt & Sons, Inc. v. *U. S.*, 281 U. S. 249 (1930) 20, 45

American Power & Light Co. v. *Securities and Exchange Commission*, 325 U. S. 385 ..... 20, 25, 42, 43, 45

American Power & Light Co. v. *Securities and Exchange Commission*, 141 F. (2d) 606 (C. C. A. 1st, (1944) 18, 39

Ashbacker Radio Corp. v. *Federal Communications Commission*, 326 U. S. , 66 Sup. Ct. 148 (1945) 16, 35

Associated Industries v. *Ickes*, 134 F. (2d) 694 (C. C. A. 2d, 1943) 42, 43, 44

Blair v. *Oesterlein*, 275 U. S. 220 (1927) 18, 40

Edward Hines Yellow Pine Trustees v. *U. S.*, 263 U. S. 143 (1923) 19

Evans v. *Federal Communications Commission*, 113 F. (2d) 166 (Ct. App. D. C., 1940) 16, 35

Federal Power Commission v. *Metropolitan Edison Co.*, 304 U. S. 374 (1938) 9

Federal Communications Commission v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940) 15, 16, 33

Federal Communications Commission v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940) 43, 44

Flournoy v. *Wiener*, 321 U. S. 253, 261 (1944) 18, 40

Fly v. *Heitmeyer*, 309 U. S. 146 (1940) 33

Guaranty Underwriters, Inc., v. *Securities and Exchange Commission*, 131 F. (2d) 370 (C. C. A. 5th, 1942) 9

PAGE

Helvering v. *Cement Investors*, 316 U. S. 527, 535 (1942) 18, 40

Helvering v. *Rubenstein*, 124 F. (2d) 969 (C. C. A. 8th, 1942) 19, 40

Hutchinson v. *Fidelity Investment Ass'n.*, 106 F. (2d) 431 (C. C. A. 4th, 1939) 18, 40

In the Matter of Am. & Foreign Power Co., Inc.; Electric Bond & Share Co., Securities and Exchange Comm'n. Release No. 4855, Jan. 25, 1944 25

Interstate Commerce Commission v. *Oregon-Washington RR. and Navigation Co.*, 288 U. S. 14 (1933) 7, 44

Jacob Siegel Co. v. *Federal Trade Commission*, U. S. , 66 Sup. Ct. 337, U. S. 66 Sup. Ct. 758, 759 (1946) 30

Jones v. *Securities and Exchange Commission*, 79 F. (2d) 617 (C. C. A. 2d, 1935), cert. den. 297 U. S. 705 (1936) 9

Jones v. *Tower Production Co.*, 120 F. (2d) 779 (C. C. A. 10th, 1941) 19, 40

Lumbermens' Mutual v. *McIver*, 110 F. (2d) 323 (C. C. A. 9th, 1940), cert. den. 311 U. S. 655 (1940) 19, 40

Marshall Field & Co., v. *N. L. R. B.*, 318 U. S. 253 (1943) 18, 38, 39

May Dept. Stores Co. v. *N. L. R. B.*, 326 U. S. , 66 Sup. Ct. 203 (1945) 18, 39

Morgan v. *U. S.*, 304 U. S. 1 (1938) 18, 41

N. L. R. B. v. *Cheney California Lumber Co.*, 326 U. S. , 66 Sup. Ct. 203 (1945) 17, 38

New York Central Securities Corp. v. *U. S.*, 287 U. S. 12, 28 (1932) 24, 30

BLEED THROUGH- POOR COPY

PAGE

Ohio Bell Tel. Co. v. *Comm'n*, 301 U. S. 292 (1937).... 18, 41

Pacific Power & Light v. *Federal Power Commission*, 141 F. (2d) 602 (C. C. A. 9th, 1944)..... 18, 39

Pan American Airways v. *Civil Aeronautics Board*, 121 F. (2d) 810 (C. C. A. 2nd, 1941)..... 35

Panagra Terminal Investigation, 4 C. A. B. 670 (1944) 21

Panhandle East. P. L. Co. v. *Federal Power Commission*, 324 U. S. 635 (1945)..... 18, 38

Perkins v. *Endicott Johnson*, 128 F. (2d) 208, 213 (C. C. A. 2d, 1942); aff'd 317 U. S. 501 (1943)..... 9

Pittsburgh & West Virginia Ry. Co. v. *U. S.*, 281 U. S. 479 (1930)..12, 13, 14, 19, 22, 24, 25, 26, 27, 28, 29, 30, 42, 46

Securities and Exchange Commission v. *Okin*, 325 U. S. 385 (1945).....14, 20, 25, 26, 27, 42, 43

Schenley Distillers Corp. v. *U. S.*, U. S. , 66 Sup. Ct. 247 (1946).....19, 28, 42

Scripps-Howard Radio, Inc. v. *Federal Communications Commission*, 316 U. S. 4 (1942)..... 43

Singer & Sons v. *Union Pacific R. Co.*, 311 U. S. 295 (1940) 19, 44, 45

Smails v. *O'Malley*, 127 F. (2d) 410 (C. C. A. 8th, 1942) 40

Todd v. *Securities and Exchange Commission*, 137 F. (2d) 475 (C. C. A. 6th, 1943).....18, 39

United States v. *Ill. Cent. R. R. Co.*, 244 U. S. 82 (1917) 9

Ward v. *Federal Communications Commission*, 108 F. (2d) 486 (Ct. of App. D. C., 1939).....16, 35

STATUTES.

PAGE

United States Constitution:

Article III, § 2 43

Amendment V 18, 41

Bituminous Coal Act of 1937:

Section 6(b) (15 U. S. C. §836(b); 50 Stat. 85) ..... 44, VIII

Civil Aeronautics Act of 1938:

Section 401(d) (49 U. S. C. §481(d); 52 Stat. 987, 54 Stat. 1235) ..... 9, I

Section 401(e) (49 U. S. C. §481(e); 52 Stat. 988, 54 Stat. 1235) 4

Section 401(h) (49 U. S. C. §481(h); 52 Stat. 989, 54 Stat. 1235) ..... 7, 8, 9, 22, 31, 33, 35, 37, I

Section 411 (49 U. S. C. §491; 52 Stat. 1003, 54 Stat. 1235) ..... 6, 22, 31, 38, II

Section 801 (49 U. S. C. §601; 52 Stat. 1014, 54 Stat. 1235) ..... 35, II

Section 1001 (49 U. S. C. §641; 52 Stat. 1017, 54 Stat. 1235) ..... 9, 16, II

Section 1006(a) (49 U. S. C. §646(a); 52 Stat. 1024, 54 Stat. 1235) ..... 7, 11, 19, 41, 45, III

Section 1006(e) (49 U. S. C. §646(e); 52 Stat. 1024, 54 Stat. 1235) ..... 10, 17, 18, 37, 38, III

Section 1006(f) (49 U. S. C. §646(f); 52 Stat. 1025, 54 Stat. 1235) ..... 2, III

Clayton Act:

Section 7 (15 U. S. C. §18; 38 Stat. 731) ..... 6, 32, 34, III

Section 11 (15 U. S. C. §21; 38 Stat. 734, 52 Stat. 1028, 54 Stat. 1235) ..... 6, IV

PAGE

Federal Communications Act of 1934 (47 U. S. C. §151; 44 Stat. 1064) 12

Section 402(b) (47 U. S. C. §402(b); 48 Stat. 1093) 43, VII

Federal Power Act (16 U. S. C. §791; 49 Stat. 863) 12

Judicial Code:

Section 240 (28 U. S. C. §347; 43 Stat. 938) 2

Motor Carrier Act (49 U. S. C. §301; 49 Stat. 543) 12

Public Utility Holding Company Act of 1935:

Section 24(a) (15 U. S. C. 79x(a); 49 Stat. 834) ..... 25, 26, 43, 44, VIII

Transportation Act of 1920:

Section 402(20) (49 U. S. C. §1(20); 41 Stat. 478) .. 45, VII

Transportation Act of 1940 (49 U. S. C. §1; 54 Stat. 898) 12

Urgent Deficiencies Act (38 Stat. 208, 219-220; 28 U. S. C. §§41, 47) 45

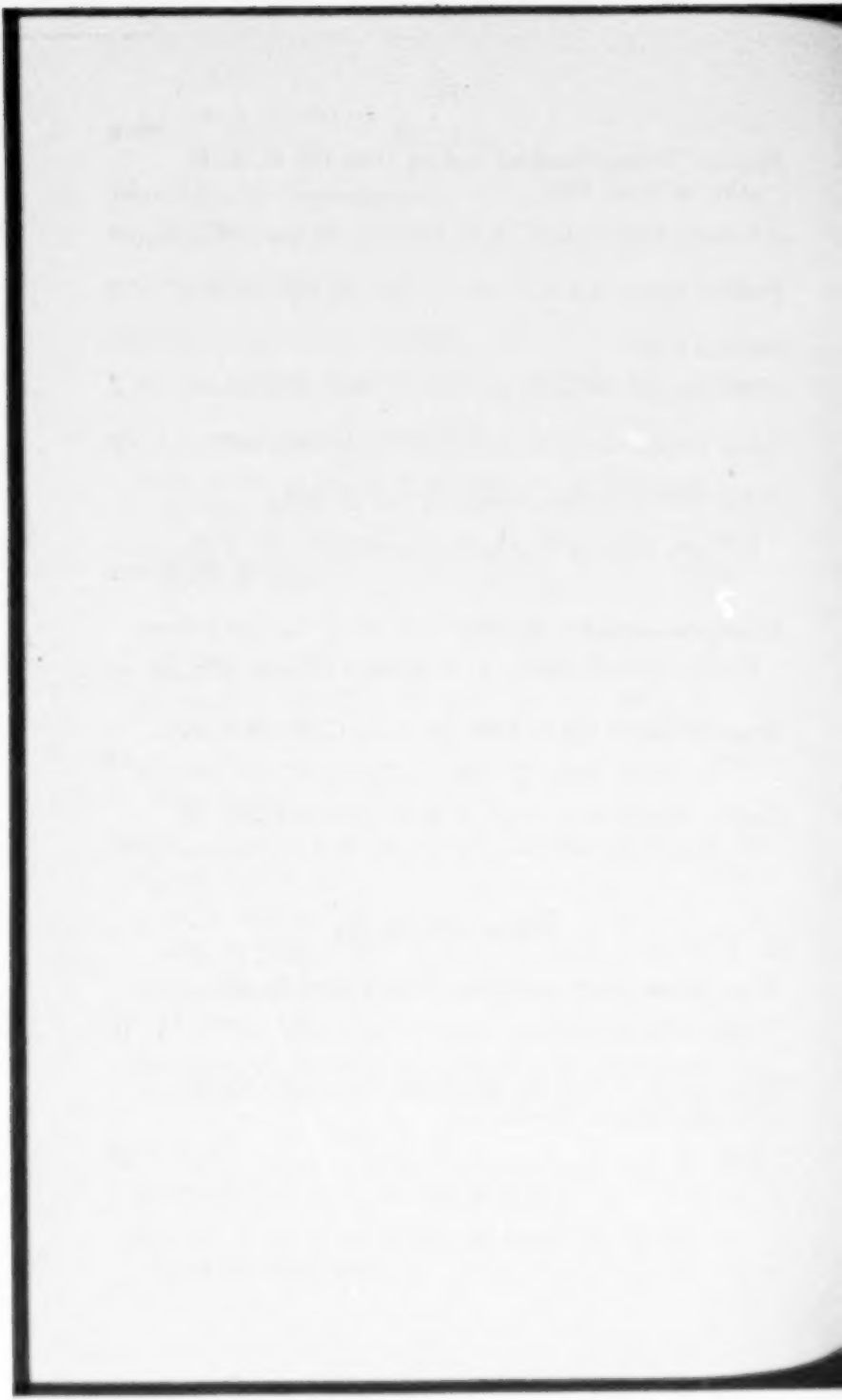
OTHER AUTHORITIES

Rules of the Supreme Court of the United States:

Rule 38, par. 5(b) 13

Rules of the United States Circuit Court of Appeals for the Second Circuit:

Rule 10 40



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Supreme Court of the United States

OCTOBER TERM, 1945.

No. .

PAN AMERICAN AIRWAYS CORPORATION and PAN AMERICAN AIRWAYS, INC.,

Petitioners,

against

W. R. GRACE & CO., CIVIL AERONAUTICS BOARD, EASTERN AIR LINES, INC., NATIONAL AIRLINES, INC., CHICAGO & SOUTHERN AIR LINES, INC., TACA, S. A., DEPARTMENT OF JUSTICE OF THE UNITED STATES OF AMERICA and PAN AMERICAN-GRACE AIRWAYS, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To The Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Pan American Airways Corporation and Pan American Airways, Inc. pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Second Circuit to review the judgment and decree of that Court (R. 433)* entered on February 25, 1946 in a cause entitled *"W. R. Grace & Co., Petitioner* v. *Civil Aeronautics Board,*

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* Page references to the printed record on certiorari are indicated "R. .....". Page references to the record before the Civil Aeronautics Board, filed with the Clerk of this Court in original form, are indicated "B. R. ....."; page references to Appendix II to the Petition and Brief filed with the Clerk of this Court, are indicated "App. II, ...".

Pan American Airways Corporation, Pan American Airways, Inc., et al., Respondents." By this judgment and decree the Court of Appeals set aside orders of the Civil Aeronautics Board dismissing as beyond the Board's jurisdiction a proceeding (begun by the Board on its own initiative) to compel an extension of the route of Pan American-Grace Airways, Inc., and remanded the cause for the Board to consider whether W. R. Grace & Co., one of the stockholders of Pan American-Grace, had the right to "speak for" Pan American-Grace and "by so doing to make the application a voluntary one" (R. 370).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 1006(f) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. § 646(f), 52 Stat. 1025, 54 Stat. 1235)* and Section 240 of the Judicial Code, as amended (28 U. S. C. § 347, 43 Stat. 938). The date of the judgment and decree to be reviewed is February 25, 1946 (R. 433).

Statement of the Matter Involved.

(1) The Background and Nature of the Controversy.

Pan American-Grace Airways, Inc. (sometimes hereinafter referred to as "Pan American-Grace" or as "Panagra") is an air carrier holding a certificate of public convenience and necessity under the Civil Aeronautics Act for operations in South America between the Canal Zone and Buenos Aires. From the outset half of its capital stock has been owned by Pan American Airways Corporation, one of the petitioners herein, and the other half by W. R. Grace & Co. (sometimes hereinafter referred to as "Grace"),

* Pertinent statutory provisions are set forth in Appendix I, *infra*, pp. I-VIII.

one of the respondents, and each of these companies has been represented by an equal number of directors on its board.

The circumstances under which Pan American-Grace was formed were as follows: Late in 1927 and early in 1928, Pan American Airways, Inc., the wholly owned operating subsidiary of Pan American Airways Corporation, was creating air transportation in Latin America under the American flag. On July 13, 1928, it was awarded the United States Foreign Airmail Contract between the continental United States and the Canal Zone for a period of ten years (R. 261). Even prior to this award, it was far advanced in plans for operations on the West Coast of South America south of the Canal. It had obtained an option on an operating concession and an airmail contract in Peru and was engaged in negotiations for similar concessions and contracts in Colombia and Ecuador (R. 258-60; B. R. 1874-78, 7060-61).

As a result of conversations during August, 1928, Pan American extended to Grace an option to participate in Pan American's contemplated operations from the Canal down the west coast of South America. The terms of the understanding were stated in a letter dated August 31, 1928 which provided that the two companies would "associate for the commencement of an airplane service in Peru with the view of ultimately inaugurating a through mail service from the Panama Canal to Valparaiso, Chile." A corporation with a capital stock of $50,000, to be owned equally by each of the two companies, was to be promptly formed for the purpose of engaging in operations in Peru under the concession on which Pan American had an option. If Pan American determined that it was "advisable to bid on a contract for carrying the mails between the

Panama Canal and Valparaiso," Grace was to "have a reasonable time after a study of the estimated costs of such operation to determine what interest, if any, we will take in the company making the bid in addition to our initial investment of $25,000, such interest not to exceed, however, more than 50% of the total capitalization." It was further stipulated that if the through service was inaugurated, Pan American was to "have charge of the operation of the service from the Canal to Valparaiso" while the Grace "houses on the West Coast of South America will be the agents of the company" (R. 270-71).

Pursuant to this understanding Pan American-Grace was organized under the laws of Delaware early in 1929. It became the successful bidder on Foreign Air Mail Contract No. 9 (R. 272-79), for air mail service from the Canal Zone to Santiago, Chile, with a right in the Postmaster General to require extension of the service to Buenos Aires, Argentina and Montevideo, Uruguay. When, under the Civil Aeronautics Act of 1938, a regime of certificates of convenience and necessity superseded the former mail contracts, this 1929 contract became the basis for the award to Pan American-Grace of a certificate of public convenience and necessity under the "Grandfather Clause" of the Civil Aeronautics Act* for service between the Canal Zone and various points in western Colombia, Ecuador, Peru, Chile, Bolivia and Argentina.

The present controversy begins with a demand advanced by Grace in 1938 that the scope of Pan American-Grace's operations should be expanded northward so as to parallel the route of Pan American Airways between the Canal Zone and the continental United States (B. R. 1744-47,

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* §401(e), 49 U. S. C. §481(e); 52 Stat. 988, 54 Stat. 1235.

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1980-1). After some months of discussion, the parties, on February 14, 1939, entered into a settlement agreement to be in force for a period of five years and thereafter until terminated on six months' written notice—which has never been given.*

Less than two years after making this settlement agreement, Grace again raised the extension issue. Pan American offered arbitration pursuant to the terms of the agreement, but this offer was declined by Grace, as were all subsequent offers (R. 257, 282-86).

(2) The Proceedings Before the Civil Aeronautics Board.

Instead of going to arbitration or resorting to the courts, Grace filed with the Civil Aeronautics Board in December, 1941, some ten days after Pearl Harbor, a "complaint" asking that the Board exercise its alleged power to amend Pan American-Grace's certificate under Section 401(h)** of the Act in such manner as to require Pan American-Grace to extend its route to the United States. This "complaint" was designated by the Board as its Docket 707 (R. 314-27).

On April 27, 1942, Grace filed with the Board a letter and "statement of facts," praying that the Board require

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* This settlement agreement provided (1) that Pan American should promptly meet Grace's complaints with respect to the adequacy of the connecting service between the continental United States and the Canal; (2) that in the event of subsequent failure of Pan American to maintain an adequate connecting service, Pan American would take appropriate steps to permit Pan American-Grace to apply for an extension north from the Canal; (3) that a Grace director was to be elected President of Pan American-Grace but that technical, traffic and other services were to be rendered to Pan American-Grace by Pan American Airways, Inc. as theretofore; and (4) that any dispute as to any phase of the plan was to be settled by arbitration (R. 280-81).

** 49 U. S. C. §481(h), 52 Stat. 989, 54 Stat. 1235.

Pan American to cease and desist from opposing the filing of an extension application by Pan American-Grace and to divest itself of its stock in Pan American-Grace to such extent as might be necessary to terminate its negative control of Pan American-Grace, in accordance with Section 411 of the Civil Aeronautics Act (49 U. S. C. §491, 52 Stat. 1003, 54 Stat. 1235) and Sections 7 and 11 of the Clayton Act (15 U. S. C. §§18, 21, 38 Stat. 731, 734, 52 Stat. 1028, 54 Stat. 1235). The Board designated this as Docket 744 (R. 327-42). Pan American filed an answer and cross-petition in Docket 744 requesting the Board to find that Grace had acquired its stock in Pan American-Grace in violation of Section 7 of the Clayton Act and to issue an appropriate complaint against Grace under Section 11 of that Act.

The Board took no action in either of these dockets. Instead, by its order of September 10, 1942, the Board instituted an entirely new proceeding, Docket 779 (R. 50-52), the purpose of which was

> "to determine whether the public convenience and necessity require that the certificate of public convenience and necessity of Panagra should be altered, amended, and modified to authorize and require (a) that Panagra's route terminate in the United States * * * ; and (b) in the event a terminal or terminals in the United States are authorized and required pursuant to this proceeding, that Panagra serve one or more intermediate points between the Canal Zone and said terminal or terminals in the United States; * * * "

Pan American-Grace, Grace and Pan American Airways, Inc. were made parties to this proceeding which was assigned for public hearing. Pan American Airways Corporation, Eastern Air Lines, Inc. and others were later permitted to intervene (B. R. 112-14, 193-95).

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At the opening of the hearing in Docket 779, Pan American moved to dismiss the proceeding for want of jurisdiction on the part of the Board to compel the proposed new operation (R. 56-65). The Board denied the motion without prejudice to renewal at the close of the hearing (B. R. 328). Thereupon, at the close of the hearing, Pan American renewed its motion to dismiss (R. 110). After brief and argument, the Board handed down its opinion and order dismissing the proceeding for want of jurisdiction to order the proposed extension (R. 31-47). The Board held that, even assuming that its power under Section 401(h) of the Civil Aeronautics Act of 1938 to order airline extension was not as narrow as held with respect to the Interstate Commerce Commission in *Interstate Commerce Commission* v. *Oregon-Washington RR. and Navigation Co.*, 288 U. S. 14 (1933), but was as broad as indicated in the dissenting opinion of Justices Cardozo, Brandeis and Stone, the extension here under consideration exceeded the scope of that power.

A petition by Grace for reconsideration was denied by the Board (R. 48, 84-106).

(3) The Proceedings in the Circuit Court of Appeals.

Grace filed a petition with the Circuit Court of Appeals for the Second Circuit for review of the orders of the Board (R. 164-176). The Board moved to dismiss Grace's petition for review or, in the alternative, for affirmance forthwith of the orders complained of (R. 1-19), on the grounds that Grace did not have the substantial interest in the orders required to give it status to obtain review under Section 1006(a)* of the Civil Aeronautics Act, and that in any event

* 49 U. S. C. §646(a); 52 Stat. 1024, 54 Stat. 1235.

the orders were not subject to review. Pan American joined in this motion (R. 20-22). The court denied the motion (R. 23). This question was resubmitted to the court at the argument on the merits (App. II, 139, 179-94, 228-30, 284-89).

Grace's contentions on the merits were (1) that the Board had erred as a matter of law in deciding that it lacked authority under Section 401(h) of the Act to compel the extension proposed, and (2) that Grace had been denied a fair hearing with respect to that question. Either expressly or by implication, the court decided both these issues in a manner *favorable* to the position taken by the Board and by the present petitioners and *adversely* to the position taken by Grace (R. 368-74). The court made no comment on Grace's claim of denial of a fair hearing, and it conceded the correctness of the Board's decision dismissing the proceeding if the case was to be regarded as it always had been—namely, as a compulsory extension proceeding under Section 401(h) (R. 368-9).

However, in spite of all this, the court, in an opinion by Judge Frank, decided *against* the present petitioners and the Board and in *favor* of Grace. It did this on the basis of a theory never advanced by any of the parties in the entire course of the proceeding. This was that the Board had power, which the Board *must* exercise, to determine in the compulsory extension proceeding whether Pan American had so exercised its voting power in Pan American-Grace as to be guilty of "illegality and fraud"; that, if the Board should so find, the Board should then consider that Grace should be deemed to have filed an effective "consent" to the extension on behalf of Pan American-Grace; and that, on the analogy of a stockholder's suit, this would permit the Board to treat the *compulsory* extension proceeding under

Section 401(h) as a *voluntary* application by Pan American-Grace for a certificate under Section 401(d) (49 U. S. C. §481(d); 52 Stat. 987, 54 Stat. 1235). (R. 368-74).*

The Questions Presented.

This case presents the following important questions with respect to the jurisdiction of the Civil Aeronautics Board and of review of its orders by the Circuit Courts of Appeal under the Civil Aeronautics Act of 1938,—a statute never heretofore construed by this Court.

(1) In a compulsory extension proceeding where the Civil Aeronautics Board finds itself without power to compel an extension on the admittedly correct ground that the extension was "outside those additional burdens which a

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* The Board's order of dismissal was the principal order sought to be reviewed by Grace in the Circuit Court of Appeals and is the only one to which the court's opinion was directed. However, the judgment and decree also sets aside two other orders. These were (1) an order of Dec. 17, 1943 (R. 49) denying a motion by Grace that consideration of Pan American's motion to dismiss be postponed until a consideration of the case on the merits after an Examiner's report (R. 66-9), and (2) an order of August 5, 1944 (R. 48) denying Grace's petition for rehearing and reconsideration of the order of May 24, 1944 (R. 84-106). A merely procedural order such as the order of December 17, 1943 is not reviewable. Civil Aeronautics Act, §1001, 49 U. S. C. §641, 52 Stat. 1017, 54 Stat. 1235; *United States* v. *Ill. Cent. R. R. Co.*, 244 U. S. 82 (1917); *F. P. C.* v. *Metropolitan Edison Co.*, 304 U. S. 375 (1938); *Jones* v. *S. E. C.*, 79 F (2d) 617 (C. C. A. 2d, 1935), cert. den. 297 U. S. 705 (1936); *Guaranty Underwriters, Inc.* v. *S. E. C.*, 131 F. (2d) 370 (C. C. A. 5th, 1942); *Perkins* v. *Endicott Johnson*, 128 F. (2d) 208, 213 (C. C. A. 2d, 1942); aff'd 317 U. S. 501 (1943). The only ground urged by Grace for reversal of the order of August 5, 1944, denying its petition for rehearing, over and above those previously urged in connection with the order of dismissal, was a claim that the order of dismissal had been without according Grace a fair hearing. This ground was not passed upon by the Court of Appeals. Accordingly, this Petition and Brief will concern themselves only with the reversal of the Board's order of May 24, 1944 dismissing the proceeding.

licensee impliedly accepts as part of the control to which his rights are in any event subject" (R. 369-70), does the Board have jurisdiction to investigate whether the failure of the air carrier to apply for the extension was due to "illegality" or "fraud" on the part of one of the stockholders, and, if the Board so finds, to assume the powers of a court of equity and treat the case as if another stockholder had derivatively filed an application on behalf of the carrier? [See (1) under "Reasons Relied on for Allowance of the Writ," pp. 13 to 14 and Point I of Brief, pp. 22 to 30.]

(2) May a Circuit Court of Appeals *require* the Board to reopen a compulsory extension proceeding initiated by it under Section 401(h) of the Civil Aeronautics Act, which the Board has dismissed without examining such questions as those indicated in the preceding paragraph, and to deal with such issues in that proceeding, when the Board has determined that the public interest would be better served by considering such quesions, to such extent as it has power to do so, in a separate proceeding under other sections of the Act? [See (2) of "Reasons Relied on for Allowance of the Writ", pp. 15 to 16 and Point II of Brief, pp. 31 to 36.]

(3) Even assuming, *arguendo*, that the two preceding questions were to be answered in the affirmative, may a Circuit Court of Appeals reverse such an order dismissing a compulsory extension proceeding solely because of the Board's failure to examine into issues such as those described in paragraph (1), where at no time during the course of the administrative proceeding had the party seeking review objected to the Board's failure to consider such questions? May this be done despite Section 1006(e) of

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the Civil Aeronautics Act of 1938, as amended (49 U. S. C. §646(e), 52 Stat. 1024, 54 Stat. 1235), providing that no objection to an order of the Board shall be considered by the court unless it was urged before the Board or reasonable grounds appear for the failure to do so? [See (3) of "Reasons Relied on for Allowance of the Writ," pp. 17 to 18 and Point III of Brief, pp. 37 to 39.]

(4) Is it consistent with the accepted and usual course of judicial proceedings for a Circuit Court of Appeals to decide novel and important questions of Federal administrative law such as those stated above, on the basis of a theory never advanced prior to the court's opinion and thus without giving the parties an adequate opportunity to be heard? [See (4) of "Reasons Relied on for Allowance of the Writ," pp. 18 to 19 and Point IV of Brief, pp. 39 to 41.]

(5) Under Section 1006(a) of the Civil Aeronautics Act of 1938, as amended (49 U. S. C. §646(a), 52 Stat. 1024, 54 Stat. 1235), which limits the right to review to persons "disclosing a substantial interest" in the order of which review is sought, does a Circuit Court of Appeals have jurisdiction, on the petition of a stockholder, to review orders which simply terminate a proceeding, begun by the Board on its own initiative, to determine whether the corporation should be compelled to operate a route for which it has not applied? [See (5) under "Reasons Relied on for Allowance of the Writ," pp. 19 to 20 and Point V of Brief, pp. 41 to 46.]

Reasons Relied on for Allowance of the Writ.

The importance of the points here decided by the Circuit Court of Appeals would, it is submitted, require review by this Court even if the issues were such as could arise only under the Civil Aeronautics Act and there were no inconsistency between the decision of the Court of Appeals and decisions of this Court or in other Circuits. The case for review by this Court is the more compelling when it is considered (a) that the decision of the Court of Appeals will constitute a precedent under such other Federal regulatory statutes as the Transportation Act of 1940, 49 U. S. C. §1, 54 Stat. 898, the Motor Carrier Act, 49 U. S. C., §301, 49 Stat. 543, the Federal Communications Act, 47 U. S. C., §151, 48 Stat. 1064, and the Federal Power Act, 16 U. S. C., §791, 49 Stat. 863; (b) that the principal decision taken by the Court of Appeals is founded primarily on a belief, stated by that court, that the authority of this Court's decision in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, 281 U. S. 479 (1930), has been impaired by a subsequent decision (R. 370); and (c) that in other respects the decision of the Circuit Court of Appeals is in conflict with decisions of this Court and of other Circuits.

Although the decision of the court below remands the cause for further proceedings before the Civil Aeronautics Board and thus does not, in form, finally dispose of the matter, a writ of certiorari should be granted at this stage. The important questions involved are clearly presented now. This Court should not delay its clarification of the confusion created by the lower court's decision pending final disposition of the cause by the Board. Furthermore, as will appear at pp. 34 to 36, *infra*, if the decision of the

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Circuit Court of Appeals were allowed to stand, these petitioners might never again be able to obtain review of these questions by this Court.

The following specific considerations are deemed to bring this petition within Rule 38, par. 5(b), of this Court:

(1) The Circuit Court of Appeals has decided an important question as to the scope of the jurisdiction of Federal administrative agencies erroneously and in a manner that conflicts with the decision of this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, 281 U. S. 479 (1930).

The principal point decided by the Court of Appeals was that where one stockholder of an air carrier contends that another is using its voting power to the prejudice of the air carrier, this purely legal question as to who has the right to "speak for" the carrier may be determined by the Civil Aeronautics Board as an incident to a certificate proceeding rather than being left for decision by the courts.

The court's decision neither purports to be nor can be logically limited to the unusual facts of this case where stock ownership of the carrier is evenly divided between two persons. It applies equally whenever a board of directors has refused to apply for a route extension contrary to the wishes of a stockholder who is willing to make the necessary allegations against the directors. Neither is it confined to cases where a carrier has refused to apply for a certificate. For if the Board, on the complaint of one stockholder, must inquire whether *failure* to apply for a certificate was due to "illegality" or "fraud" on the part of another, the Board must also be bound to inquire whether an *application* for a certificate was actuated by the best interests of the carrier or by some allegedly unlawful mo-

tive. Nor is the force of the decision as a precedent limited to the Civil Aeronautics Act. If the Civil Aeronautics Board has jurisdiction in compulsory or voluntary extension proceedings to determine the legal rights and wrongs of the feasances and non-feasances of air carrier directors and stockholders, similar jurisdiction must exist in the Interstate Commerce Commission, the Federal Communications Commission and the Federal Power Commission. Until the decision of the Court of Appeals has been reviewed by this Court, neither these tribunals nor litigants before them will know where they stand.

This issue of the power of Federal administrative agencies to consider in certificate proceedings a complaint by one stockholder that another was abusing its voting power did not arise in this case for the first time. It was decided by this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, *supra*. There the Court held that the administrative agency is to take a carrier as the agency finds it, leaving the courts to determine disputes as to who has the legal right to speak for it. The Court of Appeals conceded that the point here involved was, in essence, identical with that presented in the *Pittsburgh & West Virginia* case (R. 370). But the court refused to follow this Court's decision, thinking it to have been silently overruled by *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385 (1945). The court was clearly in error in this view, as we will show below (pp. 25 to 30). But in any event this Court can hardly permit a decision which it has never questioned to be disregarded by a lower court on the theory that this Court has overruled it without saying so. [See Point I of Brief, pp. 22, to 30.]

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(2) The Circuit Court of Appeals has wrongly intruded on the Board's discretion as to the manner in which proceedings before the Board should be conducted and the order in which issues should be determined, in disregard of the admonition of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134, 138 (1940).

When the Board instituted the compulsory extension proceeding (Docket 779), it was fully familiar with the different charges and countercharges in its files respecting Pan American-Grace. In the exercise of its sound discretion, it determined that the public interest would be best served by instituting a proceeding to determine whether the public convenience and necessity required the extension proposed, by confining the issues in that proceeding to whether the Board could order such an extension as a matter of legal power and should order it as a matter of convenience and necessity, and by *not* including in such a proceeding either Grace's charges in Docket 744 against Pan American or Pan American's countercharges against Grace. Grace made no objection to this course. Instead, it specifically urged that the issues presented by Docket 744 be excluded from Docket 779 (R. 342-49; B. R. 153; App. II, 402-406).

In its opinion of May 24, 1944, the Board decided that it was without power to act under Section 401(h) and that Docket 779 must therefore terminate (R. 32-47). It said nothing with respect to the issues raised by Grace's petition and Pan American's cross-petition in Docket 744. Of course, it retained jurisdiction to take such action thereon as might be justified by the facts and within its statutory powers. No request that it do so has been made

by Grace in the nearly two years that have elapsed since the Board's dismissal of Docket 779.

The decision of the court below requires the Board to abandon the procedure which it determined, with the acquiescence of all parties and at the affirmative request of the party seeking review of the Board's order, to be best adapted to an orderly administration of the Act. It directs the Board to consider in the compulsory extension proceeding, as inseparably related issues, the question whether public convenience and necessity require the route proposed and the claim that Pan American's refusal to sanction an application for the route was an unfair competitive practice or otherwise unlawful.

This usurpation by the court of the discretion of the Board as to the order in which matters presented to it shall be considered is contrary to Section 1001 of the Act (49 U. S. C. §641, 52 Stat. 1017, 54 Stat. 1235), is in direct conflict with the decision of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co., supra,* and is in no way supported by the decision in *Ashbacker Radio Corp.* v. *Federal Communications Commission,* 326 U. S. , 66 Sup. Ct. 148 (1945), on which the court relies.

The decision of the Court of Appeals in this respect is also in conflict with the decisions of the Court of Appeals for the District of Columbia in *Ward* v. *Federal Communications Commission,* 108 F. (2d) 486 (1939) and *Evans* v. *Federal Communications Commission,* 113 F. (2d) 166 (1940). [See Point II of Brief, pp. 31 to 36.]

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(3) The Circuit Court of Appeals, in basing its decision on a determination of issues not raised, briefed or argued before the Board or brought to the Board's attention on petition for reargument and reconsideration, has departed from the accepted and usual course of judicial proceedings and has disregarded the express limitation on its powers of review embodied in Section 1006(e) of the Civil Aeronautics Act of 1938.

This Court has repeatedly and emphatically called to the attention of the Circuit Courts of Appeal their duty to respect the policy of Congress that judicial review should be limited to issues which have been presented and passed upon by the administrative bodies—and to manifest that respect by something more than paying lip service. Here the Court of Appeals did not do even that. It failed to give any consideration to the argument that nothing remotely resembling the point on which it reversed the Board's order had been brought to the Board's attention in the extension case. Although Section 1006(e) of the Act was cited to the court in supplemental briefs for which the court called after the argument (App. II, 449), the court does not refer to the Section except in an appendix to its opinion—in itself a most unusual document—detailing certain reasons on which the court was *not* basing its action (R. 374-379). The court was so full of its new illumination as to the *undisclosed* intent of Congress to vest administrative bodies with equity jurisdiction as to be wholly intolerant of the suggestion that it heed Congress' *definitely* disclosed intention that the courts were to keep such illumination to themselves unless proper objections had first been presented to the administrative agency concerned.

In this respect the court's decision is contrary to the decisions of this Court in *N. L. R. B.* v. *Cheney California*

Lumber Co., 326 U. S. , 66 Sup. Ct. 553 (1946); *Panhandle East. P. L. Co.* v. *Federal Power Commission.*, 324 U. S. 635 (1945); *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253 (1943); and see *May Dept. Stores Co.* v. *N. L. R. B.*, 326 U. S. , 66 Sup. Ct. 203 (1945). It conflicts also with decisions of other Circuit Courts of Appeals under similar statutory provisions. *American Power & Light Co.* v. *Securities and Exchange Commission*, 141 F. (2d) 606, 612 (C. C. A. 1st, 1944); *Todd* v. *Securities and Exchange Commission*, 137 F. (2d) 475, 478 (C. C. A. 6th, 1943); *Pacific Power & Light* v. *Federal Power Commission*, 141 F. (2d) 602 (C. C. A. 9th, 1944). [See Point III of Brief, pp. 37 to 39.]

(4) The Circuit Court of Appeals has departed from the accepted and usual course of judicial proceedings by resting its decision on matters not raised, briefed or argued before it.

The court below disregarded the universal rules of appellate practice that a reviewing court will not consider points not raised before it by the parties or change the theory on which the cause was tried below. By disregarding these rules, the court denied these petitioners a fair hearing and violated the rules of "fair play" which, under the Fifth Amendment to the Constitution, are as binding on the Federal courts as they are upon administrative agencies.

In this respect the decision of the Circuit Court of Appeals conflicts with the decisions of this Court in *Morgan* v. *U. S.*, 304 U. S. 1 (1938); *Ohio Bell Tel. Co.* v. *Comm'n*, 301 U. S. 292 (1937); *Flournoy* v. *Wiener*, 321 U. S. 253, 261 (1944); *Helvering* v. *Cement Investors*, 316 U. S. 527, 535 (1942); *Blair* v. *Oesterlein*, 275 U. S. 220 (1927); and with decisions in the Fourth, Eighth, Ninth and Tenth Circuits, *Hutchinson* v. *Fidelity Investment Ass'n.*, 106 F. (2d) 431

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(C. C. A. 4th, 1939); *Helvering* v. *Rubenstein*, 124 F. (2d) 969 (C. C. A. 8th, 1942); *Lumbermen's Mutual* v. *McIver*, 110 F. (2d) 323 (C. C. A. 9th, 1940); *Jones* v. *Tower Production Co.*, 120 F. (2d) 779 (C. C. A. 10th, 1941). [See Point IV of Brief, pp. 39 to 41.]

(5) The Circuit Court of Appeals, in deciding that Grace, a stockholder asserting no more than a general interest in what Grace conceives to be the welfare of the corporation, has standing to seek review of the orders complained of, has erroneously applied to Section 1006(a) of the Civil Aeronautics Act, which requires a showing of "substantial interest", decisions under other statutes containing less stringent tests. It has thus created confusion as to the standing of a stockholder to seek review of orders of the Civil Aeronautics Board in particular and of administrative agencies generally.

The court assumed jurisdiction to review the orders of a Federal administrative body on the petition of a person neither having a direct legally protected interest in the result achieved by the Board's orders nor, since dismissal of the compulsory extension proceeding ended the controversy between the corporation and the Board, even possessed of a derivative right. Without even referring in its opinion to the issues which had been raised before it concerning the scope of the class afforded judicial review under Section 1006(a) of the Act, the court below decided this important question of Federal law in a manner which conflicts with the decisions of this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S., supra; Schenley Distillers Corp.* v. *U. S.*, U. S. , 66 Sup. Ct. 247 (1946); *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295 (1940); *Edward Hines Yellow Pine Trustees* v. *U. S.*, 263 U. S. 143

(1923); *Alexander Sprunt & Sons, Inc.* v. *U. S.*, 281 U. S. 249 (1930); *American Power & Light Co.* v. *Securities and Exchange Commission* and *Securities and Exchange Commission* v. *Okin*, 325 U. S. 385 (1945). [See Point V of Brief, pp. 41 to 46.]

If the decision of the Circuit Court of Appeals is allowed to stand, it may result in serious injustice to the petitioners, will place serious and unintended burdens on the Civil Aeronautics Board and other Federal administrative agencies, and will cause confusion in the administration of important Federal legislation and in the review of action of Federal administrative agencies.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the decision of the Circuit Court of Appeals for the Second Circuit should be granted.

PAN AMERICAN AIRWAYS CORPORATION and
PAN AMERICAN AIRWAYS, INC.
Petitioners,

By HENRY J. FRIENDLY,
Attorney for Petitioners.

JAMES P. KRANZ, JR.,
Of Counsel.

May 20, 1946.

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BRIEF IN SUPPORT OF PETITION.

The Opinions Below.

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 351-79) and that Court's *per curiam* opinion denying petitions for rehearing (R. 427-31) were rendered January 28, 1946 and February 21, 1946, respectively, but have not yet been officially reported. The opinion of the Civil Aeronautics Board (R. 32-47), rendered May 24, 1944, is reported, 4 C. A. B. 670.

Statutes.

Pertinent statutory provisions are set forth in Appendix I, *infra*, pp. I-VIII.

Specification of Errors.

The Court of Appeals for the Second Circuit, in setting aside the orders of the Civil Aeronautics Board, erred in each and all of the respects referred to in the point headings set forth below.

ARGUMENT.

I. The Circuit Court of Appeals held that the Civil Aeronautics Board had jurisdiction in a compulsory extension proceeding to inquire whether the failure of the carrier to apply for the extension was due to "illegality" or "fraud" on the part of one stockholder and, in the event of an affirmative finding, to consider the proceeding as if begun by a voluntary application derivatively filed by another stockholder. In so doing, the Circuit Court of Appeals decided an important question of Federal law erroneously and in conflict with the decision of this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S.*, 281 U. S. 479 (1930).

The basic decision taken by the Court of Appeals was that Congress has authorized Federal regulatory agencies, such as the Civil Aeronautics Board, to determine in compulsory extension proceedings whether the failure of the carrier to make a voluntary application is the result of "fraud" or "illegality" on the part of a stockholder and in the event of an affirmative finding to proceed as if a voluntary application had been made.

The issues on remand, the court tells us, "would be whether the Pan American Company was opposing the extension because it was pursuing its own advantage to the prejudice of the joint interest ('fraud'), and because it was engaging in some unfair trade practice ('illegality')." (R. 371). The latter suggestion is that in the compulsory extension proceeding under Section 401(h) the Board should conduct the same sort of inquiry as to unfair trade practices permitted by Section 411 but, instead of making the cease and desist order which Section 411 authorizes, may, without any order at at all, deal with the compulsory

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extension proceeding as if it were a voluntary one. The former suggestion is definitely that the Board should exercise equity powers. The Board is not only to sit in judgment as to whether Pan American is entitled to act on its belief that from the standpoint of "the joint interest" the extension would be a mistake, but is also to determine how far Pan American may lawfully stand on the 1928 and 1939 agreements,—and this even if the legality of these agreements is conceded. For, as the court somewhat mysteriously tells us, "even if those agreements were legal, it does not follow that Pan American is not using its voting power in Panagra illegally" (R. 374).

The decision thus taken by the Circuit Court of Appeals neither purports to be, nor can its principle logically be, limited to a case where ownership of a carrier is equally divided, or to compulsory rather than voluntary certificate proceedings, or to the Civil Aeronautics Board as contrasted with other Federal administrative agencies having regulatory powers over public utilities. The decision necessarily involves a holding that Congress has vested all these agencies with jurisdiction over questions of right and wrong as between stockholders and relating to the action of directors which have never previously been thought to come within their province.

If this question had never arisen heretofore, an authoritative pronouncement by this Court on so novel and important an issue for the guidance of all Federal administrative agencies and the lower courts would be required. Much clearer statutory language than anything in the Civil Aeronautics Act would seem to be needed to support a conclusion that Congress intended to commit to an administrative agency the decision whether one stockholder had so transgressed the law as to permit another to "speak for" the corporation,—particularly when, as the court indicates,

decision by the administrative agency on this question of corporate right would be "intricately intermeshed" (R. 374) with the agency's views on the ultimate question of public convenience and necessity. Nothing in the Act suggests that the Board may have a broader jurisdiction to compel an extension by a carrier which is a corporation with several stockholders than by a carrier which is an individual or a corporation with a single stockholder.

The facts are, however, that the problem is not a new one, that this Court has already decided it, that this Court's decision is directly contrary to that now taken by the Circuit Court of Appeals, and that the court below reached the conclusion that it did only on the basis of a belief (mistaken, as we will show below) that this Court had silently departed from its previous ruling. In the orderly administration of justice the status of one of this Court's decisions as a precedent should be finally determined by this Court and not left to be the subject of conflicting speculation by the lower courts.

Our reference is to the decision of this Court in *Pittsburgh & West Virginia Ry. Co.* v. *U. S., supra.* The Court of Appeals accurately summed up this decision as being "that, in reviewing an order of the Interstate Commerce Commission, the court might not examine whether the majority shareholders of a railroad, a party to the proceeding, were abusing their power in taking the position in the proceeding which they did. Such an inquiry was to be reserved for a separate suit, and could not be interjected into the controversy before the Commission." (R. 370). The holding of the *Pittsburgh & West Virginia* case on this point was reaffirmed by this Court in *New York Central Securities Corp.* v. *U. S.*, 287 U. S. 12, 28 (1932).

Recognizing the analogy between the problem here presented and that in the *Pittsburgh & West Virginia* case, the

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Court of Appeals deliberately declined to follow the clear lead given by this Court's decision. It did this primarily because it thought the decision had been silently overruled, saying that "in spite of some differences which we will point out, we might feel that decision conclusive here, were it not for the decision in *American Power & Light Co.* v. *Securities & Exchange Commission*, 325 U. S. 385, particularly that part of it which dealt with Okin's appeal." (R. 370). Only a brief analysis is required to show the error of the Court of Appeals in believing that the authority of the *Pittsburgh & West Virginia* decision had been impaired by the *Okin* case.

The *Okin* case involved the right of a stockholder to secure review, under Section 24(a) of the Public Utility Holding Company Act of 1935 (15 U. S. C. 79x(a), 49 Stat. 834), of approval by the Securities and Exchange Commission of a financial transaction affecting the corporation in which he held stock. The proceedings before the Commission had begun on joint applications and declarations filed by American & Foreign Power Co. and its parent Electric Bond & Share Co., for approval of a plan under which American & Foreign would refinance certain of its obligations held by Electric Bond, and Electric Bond would use certain of the proceeds, together with that of the sale of bonds of other subsidiaries, to purchase its own preferred stock in the open market.* Over the objection of Okin, a stockholder of Electric Bond, that the refinancing would reduce Electric Bond's income, and consequently the value of his stock, the Commission granted approval. Okin thereupon sought review of the Commission's order. This Court, affirming a decision of the Court of Appeals for the Second

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* *In the Matter of Am. & Foreign Power Co., Inc.; Electric Bond & Share Co.*, Securities and Exchange Comm'n. Release No. 4855, Jan. 25, 1944.

Circuit, held that Okin was a "person or party aggrieved" within the meaning of Section 24(a) of the Public Utility Holding Company Act and could obtain such review.

In order to find an inconsistency between the *Pittsburgh* case and *Okin's* case the Court of Appeals, by a fine spun analysis of the latter decision (R. 370-71), manages to come to the conclusions that this Court's judgment sustaining Okin's standing to sue *must* have rested on a holding that Okin could assert derivatively a right of Electric Bond, that therefore this Court must have thought the Securities and Exchange Commission could determine whether the acts of Electric Bond's directors were so tainted by "illegality and fraud" as to give Okin a derivative right to "speak for" Electric Bond, and that consequently agencies like the Civil Aeronautics Board could do the same.

The premise of this analysis is an attribution to this Court of an intention which this Court not only did not express but directly repudiated. The *Okin* decision was *not* based upon the ground that Okin might be heard to assert derivatively a right of Electric Bond. This Court clearly stated that, *quite apart from any question of derivative right,* Okin was a "person aggrieved" within the comprehensive language of Section 24(a) of the Public Utility Holding Company Act. As this Court said (p. 392), "we do not deem it essential that the proceeding have the character of a derivative suit."

The issue and the only issue in the *Okin* case was Okin's standing to obtain review. This Court decided that issue, not on any theory of derivative right but on the theory that Okin fell within the class authorized by Congress to obtain review. *Okin's* case did not present at all the question here presented, namely, whether an administrative agency for the regulation of carriers has been given any authority to

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determine in the course of certificate proceedings questions of right and wrong as between the carrier and its stockholders. The jurisdiction of the Securities and Exchange Commission to determine whether Electric Bond's proposals were in the interests of its stockholders was not disputed by anyone. Indeed, this was the very job which the Commission had been given. There was never any suggestion that before the Commission could hear an objection by a stockholder to Electric Bond's proposals, it must first find that the acts of the latter's directors were illegal or fraudulent. It is thus sheer distortion to find anything in this Court's holding in the *Okin* case in the least degree inconsistent with the determination in the *Pittsburgh & West Virginia* case that a Federal administrative agency charged with the regulation of transportation does not have jurisdiction similar to that of an equity court to decide whether the acts of a particular stockholder have been such as to entitle another to "speak for" the corporation.

To put the matter in another way, *Okin's* case arose under a statute which by its very terms projects the administrative agency into the determination of intracorporate matters, whereas the *Pittsburgh & West Virginia* case and this case arise under statutes concerned with the relations among carriers and between them and the traveling and shipping public.

Moreover, if this Court had intended *Okin's* case to overrule or qualify a decision so important to the jurisdiction of Federal administrative agencies as the *Pittsburgh & West Virginia* case, it would certainly have said so. Instead it cited the *Pittsburgh & West Virginia* case without qualification on the point of the usual lack of standing of stockholders to seek review of administrative action, as it has done again in a case decided at the present term,

Schenley Distillers Corp. v. *U. S.* U. S., , 66 Sup. Ct. 247 (1946). The Circuit Courts of Appeals should not be encouraged to find in this Court's opinion an undisclosed intention to impair the authority of previous decisions.

Since the court below was thus mistaken in relying on *Okin's* case as a basis for refusing to follow the *Pittsburgh & West Virginia* decision, on the court's own statement (*supra*, p. 14), this should end the matter. While the court refers to some other "differences which we will point out" (R. 370), its principal opinion can be searched for them in vain. Certain portions of the opinion denying rehearing (R. 427-30) were evidently intended to fill this gap. They do not do so.

The Court of Appeals refers to the dominance of the public interest in proceedings under the Civil Aeronautics Act and to the power of the Board over certain matters internal to a carrier (R. 430). Surely, however, the public interest is none the less dominant in proceedings under the Interstate Commerce Act. Even a casual comparison shows how closely the Civil Aeronautics Act was modeled on the earlier legislation relating to the regulation of transportation companies. Such powers over the internal affairs of air carriers as were granted to the Civil Aeronautics Board do not differ in substance from those previously granted to the Interstate Commerce Commission respecting surface carriers. Moreover, such powers as were granted over internal matters are powers to do specific things. The grant of power to the Board to prevent a particular person from sitting as a director of an air carrier is not a grant of power to determine whether a vote cast by a director may be disregarded. When Congress vested the Board with certain definite powers

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over the internal affairs of air carriers, it no more authorized the Board in effect to take over a corporation whenever necessary to accomplish a goal deemed to be in the public interest than when it conferred substantially similar powers upon the Interstate Commerce Commission.

The court's statement that the *Pittsburgh & West Virginia* case "involved nothing like the public interest patently here involved" (R. 430) is simply a confession of inability to find any tenable ground of distinction between the two cases. Whether an administrative agency is authorized to treat a stockholder as if he were "speaking for" the carrier cannot depend on whether a reviewing court considers the public interest in duplicating an existing air service between Florida and the Canal Zone to be greater than in the building of a union railroad terminal in Cleveland.

In a final effort to support its holding, the court argues that determination whether a stockholder in an air carrier is exercising his voting power in an unlawful manner demands a "specialized acquaintance with commercial aviation and its ramifications", and that to require such a question to be decided by the courts is to place the determination of such issues in a "relatively incompetent tribunal" (R. 371). In other words, the court believes that an administrative agency, whose members are not required to be and in many cases are not lawyers and who are used to looking at all problems from the standpoint of public interest rather than of private right, is better equipped than the courts to determine whether the acts of a stockholder accord with his lawful rights. The validity of such a proposition is, to say the least, debatable and would seem to be for Congress to determine. For present purposes, it is enough that the Pittsburgh & West Virginia's charges against the controlling stockholders of the Wheeling & Lake Erie called for precisely the same type of expertise in the railroad

field as do Grace's charges in that of air transportation. Yet the decision of the *Pittsburgh & West Virginia* case was what is was.

This phase of the decision of the court below calls for exercise of the reviewing powers of this Court for reasons parallel to those which recently prompted this Court to grant certiorari and reverse the judgment of the Circuit Court of Appeals for the Third Circuit in *Jacob Siegel Co.* v. *Federal Trade Commission,* U. S., , 66 Sup. Ct. 337; U. S. , 66 Sup. Ct. 758, 759 (1946). A directly applicable decision which this Court evidently considers in good standing has been disregarded by the court below on the basis of an impression that a later decision has impaired its authority. The later decision does nothing of the sort, and the other grounds relied upon by the Court of Appeals to distinguish this case from the *Pittsburgh & West Virginia* case are meaningless. For purposes of this petition, however, it is enough that the Court of Appeals has consciously created a situation where neither the Civil Aeronautics Board nor other Federal public utility regulatory agencies can know what their jurisdiction is over such intracorporate questions as those presented in the *Pittsburgh & West Virginia* case, the *New York Central Securities* case and here. Presumably the Court of Appeals itself neither supposed nor desired that this status should continue.

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II. The Circuit Court of Appeals reversed the Board's determination that all questions as to its powers to deal with the charges and countercharges of Pan American and Grace should be considered in a separate proceeding and not in the compulsory extension case. By so doing, it wrongly intruded on the discretion of a Federal administrative agency as to the order in which issues should be considered before it, in disregard of the admonitions of this Court.

When this proceeding (Docket 779) was instituted, there was already before the Board another proceeding (Docket 744) which contains the only specific charges of what the Court of Appeals has termed "illegality and fraud" ever made against Pan American with respect to the matters which the court directs the Board to hear in this proceeding and the only prayer for relief based thereon (See pp. 5-6, *supra*).

Grace's complaint in Docket 744 raises the very issue whether Pan American's use of its voting power to oppose an application for the extension was an "unfair trade practice" which the court directs the Board to consider as an incident to the compulsory extension proceeding under Section 401(h). To be sure, Grace's complaint did not include the new theory contributed by the court that even though Pan American's use of its voting power in Pan American-Grace violated no statutory command, the Board might nevertheless disregard it. It is manifest, however, that Congress has not given and could not give the Board any such general equity jurisdiction and that such power, if any, as the Board may have over Pan American's voting of its stock in Pan American-Grace must stem either from Section 411 of the Civil Aeronautics Act

or from the anti-trust laws. It follows that any power which the Board has, to deal with the question with which the Court wishes the Board to deal, can be exercised in Docket 744.

In the exercise of the discretion confided to it by Congress, the Board determined that the public interest would best be served if it were first to determine, without going into the issues in Docket 744, whether it had power to compel the extension proposed and whether public convenience and necessity required such an extension. This course received the whole-hearted approval of Grace (R. 346-49; B. R. 153; App. II 402-406).* Upon the Board's determination on May 24, 1944 in Docket 779, that it lacked jurisdiction to compel the extension because of the change in the character of the carrier which the extension would bring about, the Board was in a position to take up the charges in Docket 744. Instead of requesting the Board to expedite proceedings under Docket 744, Grace filed a petition for review of the Board's order dismissing Docket 779 (R. 164-76). It was this action by Grace, not the procedure adopted by the Board, that has been responsible for much of the delay that caused the Court of Appeals concern (R. 372-73, note 5).

By the decision sought to be reviewed, the Court of Appeals has upset the procedure adopted by the Board as

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* The reasons for Grace's desire that the issue of the extension should be determined without reference to the charges in Docket 744 are clear enough. Grace's interest was in the extension and in that alone. If it could obtain the extension, it was quite content to permit Docket 744 to lapse. It had far greater cause than Pan American to fear the result of an inquiry by the Board under Section 7 of the Clayton Act. For, while Pan American's acquisition of stock in Pan American-Grace was an acquisition of stock in an extension of its lines and thus outside the scope of the Clayton Act (see p. 34, *infra*), Grace had acquired stock of an airline directly competing with its steamship routes.

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best suited to the orderly administration of the Act and has, in effect, ordered the Board to consider the charges of unfair competition and of violation of the Clayton Act presented in Docket 744 as an incident to the proceeding under Section 401(h) in Docket 779. In this respect, the decision conflicts directly with *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134 (1940) and *Fly* v. *Heitmeyer*, 309 U. S. 146 (1940), wherein this Court directed reviewing courts to refrain from disturbing the exercise of discretion by Federal administrative agencies as to the procedure to be followed in ascertaining the public interest, saying (309 U. S. at 138):

> "Necessarily, therefore, the subordinate questions of procedure in ascertaining the public interest, when the Commission's licensing authority is invoked—the scope of the inquiry, whether applications should be heard contemporaneously or successively, whether parties should be allowed to intervene in one another's proceedings, and similar questions—were explicitly and by implication left to the Commission's own devising, so long, of course, as it observes the basic requirements designed for the protection of private as well as public interest."

Actually, the Board's procedure was not only permissible but was far better designed to protect the rights of the parties than that which the Court proposes to force upon it. In Docket 744 definite issues as to the charges of unfair trade practice and violation of the Clayton Act will be framed, and the parties will be able to adduce evidence to meet them. On the other hand, under the requirements of the Court of Appeals, a proceeding which was heard throughout as a compulsory extension proceeding under Section 401(h) involving only questions of public convenience and necessity, is to be converted *ab initio* to include

issues under Section 411 as well as the type of issue arising in a stockholder's suit. If the proceeding is conducted as the court directs, there will be an inevitable tendency—which the court appears, in fact, to have welcomed (R. 374)—that the question of unlawful corporate conduct will become so blended with questions of public convenience and necessity as to prevent a determination of the former issue, free from the impact of views held with respect to the latter.

Moreover, under the procedure directed by the court, Pan American finds itself in the unenviable position where a purely legal question may be decided against it by an administrative agency and yet *it may have no opportunity whatever* for judicial review. If the Board after a hearing in Docket 744 were to decide that for a stockholder to vote stock in an air carrier, in line with his judgment as to the best interests of the carrier and consistently with a lawful understanding made when the stock was acquired, was an unfair or deceptive practice or an unfair method of competition under Section 411, such a decision would present an issue of law reviewable by the courts. Similarly if the Board were to make an order in Docket 744 requiring Pan American to divest itself of stock in Pan American-Grace under Section 7 of the Clayton Act, although (1) the stock acquired was not in a "corporation engaged in commerce", (2) the acquisition could not have resulted in a substantial lessening of competition, and (3) in spite of the fact that the acquisition was within the blanket exemption permitting common carriers to extend their lines through acquiring stock of other carriers, the Board would be obliged to subject its order to judicial scrutiny in an enforcement proceeding. However, if the Board were to make these same determinations under the guise of a holding of "illegality and fraud" in the compulsory extension proceeding, *there is the gravest doubt that Pan American*

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could secure judicial review at all. The court directs that the issues whether Grace is entitled to "speak for" Pan American-Grace and whether the public convenience and necessity require the extension should be decided not *seriatim* but together (R. 374). A decision determining both of these issues in favor of Grace would be subject to the approval of the President under Section 801 of the Act.* In *Pan American Airways Co.* v. *Civil Aeronautics Board,* 121 F. (2d) 810 (C. C. A. 2nd, 1941), the Court of Appeals held that an order subject to such approval was not reviewable.

Apparently without the slightest consideration of such matters as these and, as will be later shown, without even affording opportunity for argument thereon, the court has held that the Board *must* decide, in the compulsory extension proceeding, questions which the Board properly reserved for separate determination in Docket 744. This decision is in conflict not only with the decision of this Court in the cases cited, but also with the decisions of the Court of Appeals for the District of Columbia in *Ward* v. *Federal Communications Commission,* 108 F. (2d) 486 (1939) and *Evans* v. *Federal Communications Commission,* 113 F. (2d) 166 (1940).

Ashbacker Radio Corp. v. *Federal Communications Commission,* 326 U. S. , 66 Sup. Ct. 148 (1945), on which the Court of Appeals relied (R. 372), presented a wholly different situation. There the action of the Federal Communications Commission in granting one of two mutually exclusive applications for a license for all practical purposes denied the other applicant the right to the hearing contemplated by Congress, thus presenting an error of law subject to correction by a reviewing court. Here the procedure adopted by the Board has prejudiced no right of

* 52 Stat. 1014, 54 Stat. 1235, 49 U. S. C. §601.

Grace and the court's only quarrel is that the Board has considered "divisible" something that the court conceives to be "indivisible". This is a matter to be decided by the Board and not by the courts.*

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* A footnote to the opinion of the court below (R. 372) may indicate that the Court felt the *Ashbacker* case to be applicable because of another proceeding (Docket 525) involving applications by various companies for certificates to operate air service to Latin America including the route between the continental United States and the Canal Zone, which had been heard by the Board. The court seems to have felt that if one of these applications were to be granted, all opportunity for the Board to accomplish anything in Docket 744 would be frustrated, in the same manner as the Federal Communication Commission's opportunity to grant Ashbacker's application was frustrated by the granting of a construction permit to Fetzer, a rival applicant, and that the remand directed by the court was the only way to prevent this. The court dwelt on this although the record before it contained nothing in regard to the existence or status of Docket 525. On this being called to the court's attention, the court stated in its opinion on rehearing (R. 431) that it did not in any way rest its decision on the circumstances just recited but used them merely as illustrative.

However, it is worth pointing out that if there had been opportunity to argue these matters, the court could have been shown that the circumstances differed from those in the *Ashbacker* case in the following respects among others; (1) There is not the same factor of physical impossibility of granting more than one application; (2) Whereas in the *Ashbacker* case the Federal Communications Commission had already granted Fetzer's application, the Board is under no compulsion to grant any of the applications in Docket 525 for the Miami-Canal Zone route, and may as readily hold these pending action in Docket 744 as pending further proceedings in Docket 779; (3) The remand directed by the Court of Appeals will not assist Pan American-Grace in any event. Docket 525 was finally submitted to the Civil Aeronautics Board more than a year ago. On the other hand, the court's statement that when the Board dismissed Docket 779 without inquiry into the lawfulness of Pan American's refusal to support an application, "the whole undertaking * * * lay ripe for final conclusion" (R. 373), is mere metaphor. No issue as to the lawfulness of Pan American's conduct had ever been set for hearing in Docket 779, and the court in its opinion on rehearing recognizes that "the Board should give all parties the opportunity to offer additional, relevant evidence unless the Board, in the exercise of sound discretion, rules that it is needlessly cumulative" (R. 428). Moreover, even the record made before the Board two and a half years ago has never been briefed on the merits, and no Examiner's report has ever been made thereon.

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III. The Circuit Court of Appeals reversed the Board's order because of the Board's failure to consider questions never urged before it and which the party seeking review had not sought to have it consider. By so doing, the court departed from the accepted and usual course of judicial proceedings, violated the express limitations of Section 1006(e) of the Civil Aeronautics Act and disregarded applicable decisions of this Court and of other Circuit Courts of Appeal.

Section 1006(e) of the Civil Aeronautics Act provides (49 U. S. C. §646(e), 52 Stat. 1024, 54 Stat. 1235):

> "No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so."

In contravention of this mandate, the court below based its decision on issues not raised, briefed or argued before the Board or even brought to the Board's attention on petition for reargument and reconsideration (R. 84-106).

The alleged error which led the Court of Appeals to reverse was that, conceding the correctness of the Board's holding that it lacked statutory power to compel the extension, the Board had not exhausted its power to act under Section 401(h), because it could and should have gone on to determine whether Grace was in a position to "speak for" Pan American-Grace and, upon an affirmative finding, to treat the proceeding as one begun on the voluntary application of Pan American-Grace derivatively filed by Grace, and to grant the application if the Board found the public convenience and necessity so required. If the failure by the Board to take this action can be made the basis of re-

versal by the court below, it is equally a ground that could have been urged before the Board by Grace. Grace's failure to raise this question before the Board, and to do so *specifically*, either at the hearings, in brief or on oral argument, or even in its petition for rehearing, is fatal to judicial review on this point.*

Contrary to the implication of the court's discussion (R. 377, 430), a general objection is not enough to satisfy the requirements of Section 1006(e). *Marshall Field & Co.* v. *N. L. R. B.*, 318 U. S. 253 (1943). The court's attempt to escape the mandate of Section 1006(e) by saying that under the Civil Aeronautics Act "the public interest looms large" (R. 429) ignores the declared public interest in not having orders of administrative agencies continually upset by reviewing courts on the basis of objections on which the agencies had no opportunity to pass. Having failed to make specific objection to the Board's failure to consider whether it might be heard to "speak for" Pan American-Grace, Grace is in the position of having consented to judgment against itself on this issue and the issue cannot be considered by the reviewing court. *N. L. R. B.* v. *Cheney California Lumber Co.*, U. S. , 66 Sup. Ct. 553 (1946).

The decision by the Court of Appeals is directly contrary to the decisions of this Court as to substantially identical sections in other statutes in *N. L. R. B.* v. *Cheney California Lumber Co., supra; Panhandle East. P. L. Co.* v. *Federal Power Commission*, 324 U. S. 635, (1945);

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* In reading the court's opinion, it should be realized that the opening sentence of paragraph 1, "It has been suggested that the Board should have considered and decided the issue of the violation of Section 411 by treating the proceeding as if it involved Grace's petition No. 744" (R. 368-69) and similar statements in the Appendix do not refer to any suggestion made by Grace but rather to suggestions first advanced by the court itself after the cause had been argued (App. II, 325-27).

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Marshall Field & Co. v. *N. L. R. B., supra;* and see *May Dep't Stores Co.* v. *N. L. R. B.*, 326 U. S. , 66 Supp. Ct. 203 (1945). The decision below has also created a conflict between the Second Circuit and the First, Sixth and Ninth Circuits. *American Power & Light Co.* v. *Securities and Exchange Commission,* 141 F. (2d) 606, 612 (C. C. A. 1st, 1944); *Todd* v. *Securities and Exchange Commission,* 137 F. (2d) 475, 478 (C. C. A. 6th, 1943); *Pacific Power & Light* v. *Federal Power Commission,* 141 F. (2d) 602, 605 (C. C. A. 9th, 1944).

IV. The Circuit Court of Appeals set aside the orders of the Board on a ground not raised in the petition for review and not referred to in brief or argument before the court by any party. In so doing the court so departed from the accepted and usual course of judicial proceedings as to call for review by this Court.

The ground on which the Court of Appeals based its decision setting aside the order of the Board was not suggested by any of the parties at any stage of the proceeding before the Board, in the petition for review or in brief or argument before the court (R. 164-76, App. II, 1-489). The ground of decision differs also from that suggested by the court in its request for supplemental briefs (App. II, 325-27), which the court set forth in an Appendix to its opinion (R. 374-79) in language so couched as to give the impression that it was dealing with points raised by the parties rather than with ideas advanced by the court itself. The Court of Appeals was so intent on announcing its discovery as to the right of Federal regulatory agencies to authorize one stockholder to "speak for" a carrier that it was not to be deterred by any such humdrum principles as those rules of fair play embodied in the doctrine that an

appellate tribunal will not consider questions or issues raised for the first time before it and will not change the theory on which the cause was tried below.

The court's departure from accepted practice cannot be justified under its Rule 10 permitting the court at its option to notice *plain error* which has not been assigned. Such a rule could have no application to a case such as this where the Board's error, to say the least, was anything but "*plain,*" where no action had ever been taken to preserve a right to object, and where affirmance will still leave open to the party alleged to be aggrieved other and more suitable paths for asserting its claims. Indeed the error, if any there be, was invited by Grace, since Grace urged the course adopted by the Board. A party will not be heard to complain in an upper court of errors induced by it below. *Smails* v. *O'Malley,* 127 F. (2d) 410 (C. C. A. 8th, 1942).

The decision of the court below in this respect conflicts with the decisions of this Court in *Flournoy* v. *Wiener,* 321 U. S. 253 (1944); *Helvering* v. *Cement Investors,* 316 U. S. 527, 535 (1942) and *Blair* v. *Oesterlein,* 275 U. S. 220 (1927), as well as with decisions in practically ever circuit. For present purposes it is sufficient to point to the conflict of the decision of the Second Circuit in this case and decisions in the Fourth, Eighth, Ninth and Tenth Circuits. *Hutchinson* v. *Fidelity Investment Ass'n,* 106 F. (2d) 431 (C. C. A. 4th, 1939); *Helvering* v. *Rubenstein,* 124 F. (2d) 969 (C. C. A. 8th, 1942); *Lumbermen's Mutual* v. *McIver,* 110 F. (2d) 323 (C. C. A. 9th, 1940), cert. den. 311 U. S. 655 (1940); *Jones* v. *Tower Production Co.,* 120 F. (2d) 779 (C. C. A. 10th, 1941).

The action of the Circuit Court of Appeals in this case is much more prejudicial than the practices condemned in the cases cited. In all those cases the point was at least

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presented in brief and argument to the reviewing court and the parties thus had an opportunity to direct argument not only to the propriety of the court's consideration of the point but also to its merits. In the case at bar, nothing remotely resembling the ground on which the decision turned had ever been suggested until after the argument. The court then called for supplemental briefs on a theory of the case (outlined in the Appendix to the court's opinion) differing both from anything previously suggested and from that finally adopted (App. II, 325-27). Turning a deaf ear to the request that if any such grounds were to be considered, further opportunity for argument should be had (R. 387, App. II, 450), the court proceeded to decision on a still different ground of which the first notice given to the parties was the opinion of the court itself. Federal appellate courts are no more immune than other agencies of Government to the guarantee of fair hearing embodied in the due process clause of the Fifth Amendment. *Morgan* v. *U. S.*, 304 U. S. 1 (1938); and *Ohio Bell Telephone Co.* v. *Comm'n.* 301 U. S. 292 (1937).

V. The Circuit Court of Appeals necessarily held that, under the circumstances here presented, a stockholder has the "substantial interest" required to obtain review under Section 1006(a) of the Civil Aeronautics Act. In so doing, the court decided an important question of Federal law and decided that question erroneously and in conflict with applicable decisions of this Court.

The standing of a stockholder of a corporation to obtain review of an order of a Federal administrative agency relating to the corporation is a question of general import-

ance which ought to be settled for the guidance of litigants and the lower courts.

This Court has decided four cases on this subject. Two of them, *Pittsburgh & West Virginia Ry Co.* v. *U. S.*,* *supra*, and *Schenley Distillers Corp.* v. *U. S.*, *supra*, dealt with statutes regulating carriers similar to the Civil Aeronautics Act. Both cases held that under such statutes a stockholder did *not* have the substantial interest required to obtain review. The other two, *American Power & Light Co.* v. *Securities and Exchange Commission*, *supra*, and *Securities and Exchange Commission* v. *Okin*, *supra*, arose under the Public Utility Holding Company Act, a statute particularly concerned with the protection of the very class in which stockholders are included and which authorized review at the suit, not only of persons "disclosing a substantial interest" but of "any person or party aggrieved". In those two cases this Court sustained the right of the stockholder to obtain review. Here the Circuit Court of Appeals has sustained the standing to sue of a stockholder in a carrier—apparently by applying Public Utility Holding Company Act decisions to a statute having an altogether different purpose and prescribing different and more stringent tests.

This error by the Court of Appeals is the more surprising in the light of the clear understanding of the fundamental considerations involved and of the importance of differences in statutory language in "standing to sue" cases shown by the same court and, indeed, by the same judge in *Associated Industries* v. *Ickes*, 134 F. (2d) 694

* We refer here, not to the portion of the *Pittsburgh & West Virginia* decision discussed in Point I of this Brief, holding that the intracorporate question of the right of the Wheeling's directors to file the applications could not be examined either before the Interstate Commerce Commission or in a reviewing court, but to the earlier portion of the opinion holding that the Pittsburgh as a stockholder in the Wheeling had no status to obtain review of the Interstate Commerce Commission's decisions on questions of public interest which *were* properly before the Commission.

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(C. C. A. 2d, 1943). At that time Judge Frank summarized the general rule as follows (pp. 700-701):

> "In a suit in a federal court by a citizen against a government officer, complaining of alleged past or threatened future unlawful conduct by the defendant, there is no justiciable 'controversy,' without which, under Article III, §2 of the Constitution, the court has no jurisdiction, *unless the citizen shows that such conduct or threatened conduct invades or will invade a private substantive legally protected interest of the plaintiff citizen;* such invaded interest must be either of a 'recognized' character, at 'common law' or a substantive private legally protected interest created by statute. • • • That the plaintiff shows financial loss on his part resulting from unlawful official conduct is not alone sufficient, for such a loss, absent any such invasion of the plaintiff's private substantive legally protected interest, is *damnum absque injuria.*" (Italics supplied.)

The only exception to this general rule is in a narrow line of cases where the courts have found the terms of a particular statute to evidence an intention by Congress to allow a special class of persons to secure review of administrative action, even though such action did not infringe a legally protected right. The principal and, we believe, the only cases in this line of authority are two decisions of this Court under Section 402(b) of the Federal Communications Act (47 U. S. C. §402(b), 48 Stat. 1093), namely *Federal Communications Commission* v. *Sanders Brothers Radio Station,* 309 U. S. 470 (1940), and *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission,* 316 U. S. 4 (1942); the *American Power & Light* and *Okin* cases, 325 U. S. 385 (1945), under Section 24(a) of the Public Utility Holding Company Act (15 U. S. C. §79x(a), 49 Stat. 834); and the decision of the Court below in *Associated In-*

dustries v. *Ickes, supra,* under Section 6(b) of the Bituminous Coal Act of 1937 (15 U. S. C. §836(b), 50 Stat. 85).

In each of these cases the statute granted review to persons or parties "aggrieved" and the structure and purpose of the statute definitely disclosed an intention on the part of Congress to include the persons there seeking review within the class to whom such review should be afforded. This Court explained the rationale of these decisions when it said in the *American Power* case (325 U. S. 390):

> "This court has not allowed the usual criteria of standing to sue to deny persons who, in analogous cases under that doctrine, would ordinarily not be permitted to invoke court review, the benefit of such review under statutes embodying *the same language* as §24(a) [citing *Interstate Commerce Commission* v. *Oregon-Washington R. & N. Co.,* 288 U. S. 14; *Federal Communications Comm.* v. *Sanders Bros. Radio Station,* 309 U. S. 470; and comparing *Singer & Sons* v. *Union Pac. Ry. Co.,* 311 U. S. 295.] The same is true of the lower federal courts [citing *Associated Industries* v. *Ickes,* 134 F. (2d) 694]. In these instances the extension of the privilege to *persons aggrieved* was held to extend it to those not technically parties, and, therefore, not entitled, without the statutory provision, to initiate litigation in a court." (Italics supplied.)

Nothing in this line of authority gives the slightest support to a view that Congress intended to exempt petitioners for review under the Civil Aeronautics Act from the requirement of a showing of infringement of substantive legal rights. The Act is a public utility regulatory statute of the familiar type. There is not a syllable in the Act indicating that Congress was looking to stockholders in

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air transport companies rather than to governmental authorities, on the one hand, and private companies with substantial rights in the premises on the other, to vindicate the interests which the statute was designed to protect. Section 1006(a) paraphrases the statements of the general doctrine of standing to sue expressed in cases arising under the Urgent Deficiencies Act. It is even more restrictive than Section 402(20) of the Transportation Act of 1920 (49 U. S. C. 1 (20), 41 Stat. 478) granting review to any "party in interest" which has been held by this Court to require the customary showing of an invasion of a legally protected interest of the person seeking review. *Singer & Sons* v. *Union Pacific R. Co.*, 311 U. S. 295 (1940).

The court made no statement of the basis on which it sustained Grace's status to obtain review. It wrote no opinion when it denied the Board's motion to dismiss, and it did not discuss the point either in its opinion on the merits or in that denying rehearing. However, the very fact that, in a case arising under Section 1006(a) of the Civil Aeronautics Act, a Circuit Court of Appeals should have cited cases decided under statutes embodying a less onerous test than that of "substantial interest" will necessarily be confusing to litigants and to other courts —and this not only under the Civil Aeronautics Act but under other statutes embodying the substantial interest test. Review by this Court is therefore required even if the result at which the lower court arrived were correct.

The result, however, is manifestly erroneous. The order under review violated no direct legally protected right of Grace. It did not affect Grace directly as a stockholder as did the order in *American Power & Light Co.* v. *Securities and Exchange Commission, supra.* It simply failed to compel the corporation to do something which Grace as a stockholder wanted done. This no more violated an

independent right of a stockholder than did the order of the Interstate Commerce Commission in the *Pittsburgh & West Virginia* case authorizing the Wheeling & Lake Erie to do something which the Pittsburgh & West Virginia, as a stockholder in the Wheeling, wanted to prevent. Neither did the order violate any right of the *corporation* which Grace as a stockholder might assert derivatively on the corporation's behalf. This is so for two reasons. In the first place, the doctrine of derivative right does not apply in "standing to sue" cases under statutes like the Interstate Commerce Act and, by analogy, the Civil Aeronautics Act, as the *Pittsburgh & West Virginia* case authoritatively shows. Secondly, even if the doctrine might apply in some cases, it can not do so here. For the Board's order had no effect whatever upon the corporation. The Board simply declined to exercise coercion against it. No right of the corporation was affected which a stockholder might assert in its name.

Conclusion.

It is respectfully submitted that the petition for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit should be granted.

HENRY J. FRIENDLY,
Attorney for Petitioners.

JAMES P. KRANZ, JR.,
Of Counsel.

May 20, 1946.

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Appendix I.

Statutory Provisions.

Pertinent statutory provisions are as follows:

Civil Aeronautics Act of 1938, as Amended.

SECTION 401(d)(1). "The Board shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the Board hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied." (52 Stat. 987, 54 Stat. 1235, 49 U. S. C. §481(d)(1).)

SECTION 401(h). "The Board, upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided,* That no such certificate shall be revoked unless the holder thereof fails to comply, within a reasonable time to be fixed by the Board, with an order of the Board commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the Board to have been violated. Any interested person may file with the Board a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate." (52 Stat. 989, 54 Stat. 1235, 49 U. S. C. §481(h).)

SECTION 411. "The Board may, upon its own initiative or upon complaint by any air carrier or foreign air carrier, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier or foreign air carrier has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation. If the Board shall find, after notice and hearing, that such air carrier or foreign air carrier is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier or foreign air carrier to cease and desist from such practices or methods of competition." (52 Stat. 1003, 54 Stat. 1235, 49 U. S. C. §491.)

SECTION 801. "The issuance, denial, transfer, amendment, cancelation, suspension, or revocation of, and the terms, conditions, and limitations contained in, any certificate authorizing an air carrier to engage in overseas or foreign air transportation, or air transportation between places in the same Territory or possession, or any permit issuable to any foreign air carrier under section 402, shall be subject to the approval of the President. Copies of all applications in respect of such certificates and permits shall be transmitted to the President by the Board before hearing thereon, and all decisions thereon by the Board shall be submitted to the President before publication thereof. This section shall not apply to the issuance or denial of any certificate issuable under section 401(e) or any permit issuable under section 402(c) or to the original terms, conditions, or limitations of any such certificate or permit." (52 Stat. 1014, 54 Stat. 1235, 49 U. S. C. §601.)

SECTION 1001. "The Board may conduct its proceedings in such manner as will be conducive to the proper dispatch of business and to the ends of justice. No member of the Board shall participate in any hearing or proceeding in which he has a pecuniary interest. Any person may appear before the Board and be heard in person or by attorney. Every vote and official act of the Board shall be entered of record, and its proceedings shall be open to the public upon

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the request of any interested party unless the Board determines that secrecy is requisite on grounds of national defense." (52 Stat. 1017, 54 Stat. 1235, 49 U. S. C. §641.)

SECTION 1006(a). "Any order, affirmative or negative, issued by the Board under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore." (52 Stat. 1024, 54 Stat. 1235, 49 U. S. C. §646(a)).

SECTION 1006(e). "The findings of facts by the Board, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board shall be considered by the court unless such objection shall have been urged before the Board or, if it was not so urged, unless there were reasonable grounds for failure to do so." (52 Stat. 1024, 54 Stat. 1235, 49 U. S. C. §646(e)).

SECTION 1006(f). "The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in sections 239 and 240 of the Judicial Code. (52 Stat. 1025, 54 Stat. 1235, 49 U. S. C. §646(f)).

The Clayton Act, as Amended

SECTION 7. "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such com-

merce in any section or community, or tend to create a monopoly of any line of commerce.

• • • • • •

"This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

"Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carrier from acquiring and owning all or any part of the stock of a branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other such common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired. • • •" (38 Stat. 731, 15 U. S. C. §18).

SECTION 11. "Authority to enforce compliance with sections two, three, seven and eight of this Act by the persons respectively subject thereto is hereby vested: In the Interstate Commerce Commission, where applicable to

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common carriers subject to the Interstate Commerce Act as amended; in the Federal Communications Commission, where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Civil Aeronautics Board where applicable to air carriers and foreign air carriers subject to the Civil Aeronautics Act of 1938 * * *; in the Board of Governors of the Federal Reserve System, where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission, where applicable to all other character of commerce, to be exercised as follows:

"Whenever the commission or board vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections two, three, seven and eight of this Act, it shall issue and serve upon such person a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission or board requiring such person to cease and desist from the violation of the law so charged in said complaint. Any person may make application, and upon good cause shown may be allowed by the commission or board, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission or board. If upon such hearing the commission or board, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act, if any there be, in the manner and within the time fixed by said order. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the

United States, as hereinafter provided, the commission or board may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section.

"If such person fails or neglects to obey such order of the commission or board while the same is in effect, the commission or board may apply to the circuit court of appeals of the United States, within any circuit where the violation complained of was or is being committed or where such person resides or carries on business for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceeding, including all the testimony taken and the report and order of the commission or board. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission or board. The findings of the commission or board as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material, and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission or board, the court may order such additional evidence to be taken before the commission or board and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission or board may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be

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final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in section two hundred and forty of the Judicial Code.

"Any party required by such order of the commission or board to cease and desist from a violation charged may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission or board be set aside. A copy of such petition shall be forthwith served upon the commission or board, and thereupon the commission or board forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission or board as in the case of an application by the commission or board for the enforcement of its order, and the findings of the commission or board as to the facts, if supported by testimony, shall in like manner be conclusive.

"The jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside, or modify orders of the commission or board shall be exclusive. * * *" (38 Stat. 734, 43 Stat. 939, 48 Stat. 1102, 49 Stat. 704, 52 Stat. 1028, 54 Stat. 1235; 15 U. S. C. § 21).

TRANSPORTATON ACT OF 1920.

SECTION 402(20). "* * * Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; * * *" (41 Stat. 478, 49 U. S. C. § 1(20)).

FEDERAL COMMUNICATIONS ACT OF 1934, AS AMENDED.

SECTION 402(b). "An appeal may be taken, in the manner hereinafter provided, from decisions of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

"(1) By any applicant for a construction permit for a radio station, or for a radio station license, or for renewal of an existing radio station license, or for modification of an existing radio station license, whose application is refused by the Commission.

"(2) By any other person aggrieved or whose interests are adversely affected by any decision of the Commission granting or refusing any such application.

"(3) By any radio operator whose license has been suspended by the Commission." (48 Stat. 1093, 50 Stat. 197, 47 U. S. C. § 402(b)).

PUBLIC UTILITY HOLDING COMPANY ACT OF 1935.

SECTION 24(a). "Any person or party aggrieved by an order issued by the Commission under this title may obtain a review of such order in the circuit court of appeals of the United States within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *" (49 Stat. 834, 15 U. S. C. 79x(a)).

BITUMINOUS COAL ACT OF 1937.

SECTION 6(b). "Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. * * *" (50 Stat. 85, 15 U. S. C. § 836(b)).

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Appendix II.

Pursuant to paragraph 4 of the stipulation of the parties filed in this Court (R. 436), Petitioners have filed with the Clerk of this Court, as Appendix II to this Petition and Brief, a single copy of each of the briefs filed by the parties in the United States Circuit Court of Appeals for the Second Circuit in *W. R. Grace & Co. Civil Aeronautics Board, et al.*, Docket No. 19520, and of each of the letters passing between that Court and the parties referred to in said stipulation.